No. 73-1319

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In the Supreme Court of the United States

OCTOBER TERM, 1973

ANTONIO M. VILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted on three counts of willfully aiding and assisting in the preparation of false or fraudulent federal income tax returns, in violation of Section 7206(2) of the Internal Revenue Code of 1954, 26 U.S.C. 7206(2). He was sentenced to concurrent terms of two years' imprisonment. The court of appeals affirmed petitioner's conviction on Count I and declined to review his other convictions (Pet. App. A), relying upon the concurrent sentence doctrine of *United States* v. *Tager*, 479 F. 2d 120 (C.A. 10), certiorari denied January 21, 1974 (No. 73-393). Petitioner here principally challenges the sufficiency of the evidence on Count I.

Count I of the indictment concerned petitioner's preparation of the 1969 federal income tax return of Lloyd and Pansy Cisneros (hereinafter referred to collectively as "the taxpayers"). The taxpayers owned and operated a small cement company, and Mrs. Cisneros kept the company's books (I Tr. 9).[1] The taxpayers furnished these books to petitioner in connection with his preparation of their return (I Tr. 3-4, 8-11). Included with the books were summary figures or totals prepared by Mrs. Cisneros. Those totals somewhat overstated the expenses shown by the journal entries for materials and supplies and for salaries and wages (see Pet. 8), but the return prepared by petitioner for the taxpayers claimed expenses for those items, and for repair and maintenance, considerably in excess even of the amounts shown by Mrs. Cisneros' summary figures, as the following table illustrates (see I Tr. 14-15):

	Journal Entries	Summary Figures	Deduction Claimed on Return
Materials & supplies	$49,568.82	$50,054.82	$54,699.47
Salaries & wages	$32,992.68	$42,989.68	$48,522.04
Repair & maintenance	$ 1,164.22	$ 1,164.22	$ 1,364.22

The taxpayers testified that they submitted no other materials to petitioner and provided no other information to petitioner regarding any additional expenses (except for information about certain uncollectible bad debts) (I Tr. 9-11, 16, 19, 27-28). A subsequent audit disclosed that the taxpayers' return understated their tax liability by approximately $1,900 (I Tr. 25-26). A portion

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[1] "Tr." refers to the transcript of proceedings at trial.

of that understatement was attributable to the inflated deductions for the items shown in the table above (I Tr. 25).

1. (a) Petitioner's principal challenge (Pet. 10-16, 20-24) is to the sufficiency of the evidence. The court of appeals carefully considered this question and decided it adversely to petitioner (Pet. App. A), and it warrants no further review. In any event, as the brief statement above illustrates, there was ample evidence to support a finding that petitioner willfully prepared a false return on behalf of the taxpayers.

(b) Petitioner contends (Pet. 16-17) that the prosecution should not have been permitted to introduce the taxpayers' books into evidence because their summary figures were inaccurate. But those books, which were the only materials furnished to petitioner in connection with his preparation of the taxpayers' return, were clearly probative on the issue of willfulness. Petitioner's claim presumably is that inaccurate summary figures could not have been used to prove the falsity of the return which he prepared; but since the deductions claimed for the taxpayers by petitioner were higher than the summary figures which were themselves higher than the taxpayers' actual expenses as reflected by the journal entries, petitioner could not conceivably have been prejudiced by admission of the summary figures.

(c) Petitioner also contends (Pet. 17-20) that the district court erred in admitting Mrs. Cisneros' testimony that the taxpayers' understatement of their tax liability, as determined by the Internal Revenue Service's audit, was partially due to the overstatement of the three expense deductions in question. Petitioner's objection is to the introduction of evidence pertaining to the audit without a proper foundation. But petitioner's counsel, after

successfully objecting to admission of the audit sheet (I Tr. 7-8), had himself opened up the area on cross-examination (I Tr. 21-22); the government elicited Mrs. Cisneros' further testimony with respect to the audit (I Tr. 25) on redirect examination, and that testimony was clearly within the scope of such examination.

2. Petitioner contends (Pet. 24-26) that in this case, unlike *United States* v. *McKee*, 456 F. 2d 1049 (C.A. 6), and other successful tax preparer prosecutions under Section 7206(2), there was no basis for concluding that he had not been furnished information which justified the false deductions. But the taxpayers' testimony here, just as in those other cases, provided an ample basis for concluding beyond a reasonable doubt that they had furnished no information justifying the deductions which petitioner claimed on their behalf.

3. Petitioner raises (Pet. 27) an objection to the exclusion of his response to a question by his counsel concerning another taxpayer's tax return which formed the basis for his conviction on another count. Any error with respect to the exclusion of that testimony would not affect the validity of the judgment below, affirming petitioner's conviction on Count I, and that issue is therefore not properly before this Court. In any event, defense counsel's question[2] asked petitioner to speculate about how he would have prepared that other taxpayer's return under certain hypothetical circumstances. The

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[2]Q. * * * can you tell us whether you would have given him a deduction for $600 if he had not stated that was his mileage?

A. No, I would not.

question in effect asked petitioner to testify concerning his personal habit or practice in preparing returns, but it was inartfully phrased to accomplish that result and was therefore subject to exclusion. See McCormick, *Evidence* §162 (1954). The desired testimony could have been elicited by proper questioning.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.